Filed 3/14/19 P. v. Gipson CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GERALD A. GIPSON, Defendant and Appellant.	A150900 (Alameda County Super. Ct. No. 176451)

Appellant Gerald A. Gipson was tried before a jury and convicted of offenses related to the murder of Timothy Wilson on one occasion and the robbery of Victoria Flowers on another. He contends: (1) the trial court abused its discretion by denying his motion to continue the trial, thus depriving him of effective assistance of counsel; (2) the court erred in denying him substitute counsel to prepare a motion for new trial based on ineffective assistance of counsel; (3) the admission of improper expert opinion testimony violated his right to due process; (4) the case must be remanded for resentencing in light of the passage of Senate Bills 620 and 1393, which give the trial court the discretion to strike firearm and serious felony enhancements; and (5) the court erroneously imposed a great bodily injury enhancement on the murder count. We remand for resentencing but otherwise affirm.

I. BACKGROUND

On July 23, 2014, at 3:00 p.m., Wilson was standing on the sidewalk of East 17th Street in Oakland, near his home. He was looking at his cell phone and did not have a gun or other weapon in his hand, though as a drug dealer, he might have had access to a

weapon he had stashed elsewhere earlier in the day. Appellant approached Wilson and shot him. Flavio Lopez, who was visiting a friend who lived across the street, heard two gunshots and turned to see Wilson lying on the ground, holding his hands to the side of his face with his palms outward, with appellant standing nearby pointing a gun at Wilson's head. When appellant fired a third shot[1] Lopez yelled, "Hey" and appellant turned, covered his face with his tee shirt, and walked toward Seminary Avenue. Wilson died from a gunshot wound to his head.

After the shooting, appellant's phone and that of his friend Rolls Royce Mitchell were wiretapped as part of the homicide investigation.

On September 25, 2014, Victoria Flowers went to the Eastmont Town Center and removed $40 from an automated teller while her three-year-old son slept in the car. Appellant, who had been waiting in a dark sports utility vehicle, got out, pointed a gun at her and said, "Bitch, give me everything." Flowers gave appellant the $40 she had just withdrawn and withdrew an additional $100 at appellant's direction. He gave Flowers back $20, telling her it was for her baby.

Appellant was being surveilled by undercover officers of the Oakland Police Department, who observed the robbery but did not intervene because they wanted to avoid a hostage situation. As appellant drove away, uniformed officers tried to stop and arrest him at the direction of the undercover officers. Appellant collided with a police vehicle and attempted to flee on foot. He was arrested and officers recovered a loaded .40 caliber Smith & Wesson pistol, which had also been used in the Wilson killing.

Appellant was interviewed by Lieutenant Tony Jones and Sergeant Brad Baker of the Oakland Police Department on October 14, 2014. Appellant initially denied knowing

---

[1] Lopez heard a total of three shots fired. The coroner who examined Wilson's body found five wounds. She believed the wounds were consistent with a minimum of two gunshots and a maximum of five, but two shots were consistent with the two bullet casings that were recovered from the scene. Wilson's injuries included a fatal gunshot wound to his head that went through the scalp and brain and exited through the front left cheek before reentering the body at the left shoulder.

anything about Wilson's murder. He then considered aloud the sentences he might receive for killing Wilson: "First degree murder—life sentence. Second degree murder—life sentence. Manslaughter—heat of passion—that's rare. Involuntary? No, no, no, no, no. Involuntary in heat of passion. . . .hypothetically speaking, once again—just say if I did say I got into it with him or if he robbed me—this. . . amount of time ago, right? Or whatever the case may be—still looking at it as second degree which still [carries a] life sentence." Appellant asserted Wilson "had money on my head to smoke me" and claimed Wilson had $50,000 on his head. He said he had been walking along East 17th Street when Wilson had "peeked" at him from behind a gate. Appellant asked him, " 'What's up, Nigga?' " and when Wilson replied, " 'Nothin.' What's up?' " appellant grabbed his pistol, turned around, and shot him.

The district attorney filed an information charging appellant with the murder of Wilson (count 1), the first degree automated teller robbery of Flowers (count 3), and two counts of possessing a firearm having been previously convicted of a felony (counts 2 & 4). (Pen. Code, §§ 187, 211, 212.5, subd. (b), 29800, subd. (a).)[2] With respect to the murder count, it was alleged that appellant had personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of sections 12022.53, subdivision (d) and 12022.7, subdivision (a), had inflicted great bodily injury under section 12022.7, subdivision (a), had personally and intentionally discharged a firearm under section 12022.53, subdivision (c), and had personally used a firearm under sections 12022.53, subdivision (b) and 12022.5, subdivision (a). As to the robbery count, it was alleged appellant had personally used a firearm under sections 12022.53, subdivision (b) and 12022.5, subdivision (a). Appellant was alleged to have suffered a prior conviction under the three strikes law and prior serious felony enhancement. Prison priors were also alleged. (§§ 667, subd. (a), 667.5, subd. (b), 1170.12 (c) (1).)

A jury trial was held at which appellant did not dispute the robbery of Flowers and did not dispute being the person who had killed Wilson, but claimed to have acted in self-

---

[2] Further statutory references are to the Penal Code unless otherwise indicated.

defense when he shot Wilson. Appellant testified he had been shot several times and that in 2013, he learned that Shaun Wilson (Cali Cash) had offered a cash bounty for his murder. When he was walking along East 17th Street past Wilson, he had an "eerie feeling," so he turned and he saw Wilson behind a bush. Appellant made an association between Wilson and the bounty on his head; he walked back toward Wilson and asked, "What's up, OG?" Wilson's hands were behind his back and he "was like snarling." Appellant believed Wilson had a gun and would kill him, even though he admitted never seeing a gun in Wilson's possession. He pulled out his gun and shot Wilson twice.

The defense also presented the testimony of a psychologist who had met with appellant and believed he suffered from post-traumatic stress disorder (PTSD). In the psychologist's opinion, appellant's PTSD affected his mental state at the time of the shooting.

The prosecution's theory was that the Wilson killing was a premediated first degree murder, which was an attempt to draw out Wilson's nephew Shaun Wilson as part of an ongoing intra-gang feud. The prosecution presented the testimony of Lieutenant Jones, who had grown up in Oakland, was familiar with the Sem City or Seminary street gang, and testified as a gang expert. Lieutenant Jones explained that in 2006, Sem City member Michael Culpepper (whom he personally knew) was killed by fellow member Shaun Wilson during an argument. This created a schism within Sem City, with appellant and his friend Rolls Royce Mitchell belonging to the faction at odds with Shaun Wilson. Timothy Wilson was Shaun's uncle. In Lieutenant Jones's opinion, appellant was a member of the Sem City gang (which appellant denied).

The jury was instructed on both reasonable and unreasonable self-defense. (See *People v. Elmore* (2014) 59 Cal.4th 121, 133–134 [discussing principles of reasonable and unreasonable self-defense].) Appellant was convicted as charged. The court denied appellant's request for new counsel to prepare his motion for new trial and sentenced him to prison for a determinate term of 23 years four months (the six-year upper term on the robbery charge, doubled to twelve years under the three strikes law plus ten years for the firearm enhancement, and a consecutive term of 16 months, or one-third the middle term,

for one of the felon with a firearm charges, doubled under the three strikes law) plus 75 years to life (25 years to life for the murder count, doubled to 50 years to life under the three strikes law, plus 25 years to life for the firearm enhancement attached to that count).

II. DISCUSSION

A. *Denial of Continuance*

Appellant contends the trial court abused its discretion and denied him effective assistance of counsel by denying his motion for a continuance. We disagree.

1. Procedural History

After the Public Defender of Alameda County declared a conflict of interest, the superior court appointed defense counsel on January 27, 2016. On March 25, 2016, almost two months after being assigned to the case, defense counsel filed a motion to continue the trial pursuant to section 1050. Counsel declared that after he was appointed, he received 1,455 pages of discovery and 79 CDs from the prosecutor, plus a 2,500-page file from the public defender. Counsel indicated there were 151 potential witnesses in this case.

The parties appeared in the calendar department on March 28, 2016. The motion to continue was denied but the presiding judge stated it was "effectively" granted because the case was being sent to a department where there would be a slow start. The case was initially assigned to Judge Goodman but on March 30, 2016, was sent to Judge Nakahara. The matter was sent out for trial to begin April 6, 2016. At a hearing on April 7, the parties were given until April 11 to file motions, and the prosecutor received a continuance for a family vacation between April 29 and May 9 or 10. Defense counsel did not request additional time, though according to appellant (at a motion for new trial hearing) he had been told by Judge Nakahara that if he needed more time the judge would try to accommodate him.

Jury selection began April 26, 2016 and was completed April 28, 2016. The court continued the matter until May 16, when the jury was sworn and trial commenced. Thus, appellant had a de facto continuance of seven weeks between the time he brought his motion to continue (March 24) and the time trial commenced (May 16).

2. Legal Principles.

As appellant acknowledges, we review the denial of a motion to continue for abuse of discretion. (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) Although the trial court should not exercise its discretion in such a way that counsel is denied a reasonable opportunity to prepare for trial (*ibid*.), a defendant must show prejudice flowing from the absence of a continuance; namely, that a result more favorable to him probably would have ensued had the continuance been granted. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant argues that in this case, the denial of a continuance resulted in the deprivation of effective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

Here, appellant has not shown that the trial court denied his counsel the opportunity to prepare for trial and in so doing abused its discretion or denied him effective assistance of counsel. Counsel indicated he had not finished reviewing the discovery provided by the prosecution and former counsel's file when he brought the motion to continue, but there is no reason he could not have done so by the time trial began seven weeks later and no showing that he did not in fact do so.

Appellant's argument that counsel did not adequately investigate and did not have the information needed to decide on defense witnesses and strategy is not supported by the record, which is devoid of any information about what counsel had reviewed by the time trial began. Appellant argues that he was deprived of effective assistance of counsel in the pretrial stages, noting that his attorney failed to move to suppress the wiretap evidence or the data seized from his cell phone incident to arrest. But other than making

some conclusory arguments, appellant does not specify *why* such motions would have been meritorious if brought, nor does he even identify the evidence that would have been suppressed.

Nor has appellant established that the denial of a continuance resulted in actual prejudice. Appellant did not contest the robbery charge and did not deny his identity as the man who shot Timothy Wilson. His defense at trial was that he had shot Wilson because he believed Wilson was going to shoot him, but it was uncontested that Wilson was not armed and appellant acknowledged in his testimony that he did not see Wilson carrying a gun or other weapon. The jury would have inevitably heard statements made by appellant during his interrogation in which he weighed out loud the different sentences that would attach if the jury convicted him of different homicide offenses, and appeared to be tailoring his story accordingly. Even if we accept that defense counsel might have obtained the suppression of certain evidence if he had been better prepared (a point with which we do not necessarily agree), it does not follow that it is reasonably probable the jury would have accepted his self-defense claim and convicted him of something less than first degree murder on count 1.

B. *Motion for Substitute Counsel to Prepare Motion for New Trial*

Appellant argues the trial court erred in declining to appoint new counsel to investigate and prosecute his motion for new trial, which presented issues of ineffective assistance of trial counsel. We disagree.

Before sentencing, appellant submitted a handwritten request for the appointment of new counsel to represent him in presenting the motion for new trial because he would be raising claims of ineffective assistance of counsel. Defense counsel thereafter filed a motion for new trial based on the presentation of testimonial hearsay by the prosecution's gang expert in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). At a hearing on that motion, defense counsel stated that he and appellant had spoken, appellant wanted to file a motion for new trial based on ineffective assistance of counsel, and there should be a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Defense counsel also indicated they were getting along fine and he would be happy to conduct research and answer specific questions appellant might have.

On November 17, 2016, defense counsel declared a conflict of interest and asked to be relieved. On December 19, 2016, counsel withdrew this request. After several continuances were granted so that appellant could prepare his own motion for new trial, appellant filed a series of handwritten motions for new trial. In one of these motions, appellant argued that trial counsel had been ineffective because he did not have enough time to prepare, had failed to call defense witnesses, had failed to introduce the preliminary hearing transcript and wiretap affidavit as evidence, had misrepresented the facts and law, and did not object to the testimony of Lieutenant Jones. Defense counsel conveyed a handwritten request by appellant to have new counsel appointed. The court allowed argument and defense counsel stated, "I do agree that I didn't have time." The court denied a new trial and observed that counsel had 110 days between his appointment and the commencement of opening statement.

Appellant contends the trial court should have granted his request for substitute counsel. We disagree. The court is not required to appoint new counsel whenever the defendant alleges that his trial attorney provided ineffective assistance. (*People v. Smith* (1993) 6 Cal.4th 684, 695–696 (*Smith*); see *People v. Sanchez* (2011) 53 Cal.4th 80, 90.) Rather, "substitute counsel should be appointed when . . . necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*Smith, supra,* 6 Cal.4th at p. 696; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1112.) This standard was not met in this case.

The court did not hold a separate *Marsden* hearing to evaluate appellant's current satisfaction with counsel. But any error in this regard was harmless beyond a reasonable

doubt. (See *People v. Chavez* (1980) 26 Cal.3d 334, 348–349 [abuse of discretion under *Marsden* reversible only if error causes prejudice]; *People v. Washington* (1994) 27 Cal.App.4th 940, 944 (*Washington*) [same].) Appellant made no showing that a *Marsden* motion would have been granted had it been heard. (*Washington*, at p. 944.) Appellant's relations with his trial counsel had not broken down and indeed, appeared cordial and cooperative. It is apparent from his filings that appellant believed counsel's alleged deficiencies had arisen during the trial itself, and he was not precluded from attacking the judgment against him on this basis. (*Ibid*.)

"The fact that no *Marsden* motion was entertained does not preclude [appellant] from attacking the competency of his attorney. Indeed, we have reviewed counsel's actions . . . and conclude that no grounds for claiming ineffective assistance of counsel exist. [Appellant] was ably represented and the evidence against him was nothing less than overwhelming. We cannot see how the appointment of a different attorney would have gained [appellant] a new trial, or could have had any effect on the sentence imposed. . . . Under the circumstances, and on the record before us, we cannot see that [appellant] would have obtained a result more favorable to him had the motion been entertained." (*Washington*, *supra*, 27 Cal.App.4th at p. 944.)

C. *Expert Testimony*

Appellant challenges the testimony of Lieutenant Jones, who testified for the prosecution as a gang expert. We address each claim in turn.

1. Opinion Regarding Intent

Appellant contends the trial court abused its discretion in allowing Lieutenant Jones to offer an opinion that the shooting was motivated by the killing of Michael Culpepper and appellant's denial of this during his interrogation was not credible. Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, overruled on other grounds in *People v. Vang* (2011) 52 Cal.4th 1038, 1049 (*Vang*), appellant argues that Lieutenant Jones's testimony amounted to an impermissible opinion regarding appellant's intent at the time of the shooting, an issue properly reserved for the trier of fact. (See *Vang*, at p. 1048.)

Applying the deferential abuse-of-discretion standard applicable to rulings concerning the admissibility of evidence (*People v. Waidla* (2000) 22 Cal.4th 690, 717), we disagree.

Motive is relevant in a criminal prosecution, and testimony that a criminal act was committed for the benefit of a gang is relevant to prove motive. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) Gang expert testimony has repeatedly been approved to show the motivation of a particular crime so long as that testimony is in a proper format. (*Ibid*.; see *Vang*, *supra*, 52 Cal.4th at p. 1048.) Lieutenant Jones was entitled to opine that Wilson's killing was gang related rather than the product of self-defense.

In the portion of Lieutenant Jones's testimony cited by appellant, he is asked by the prosecutor what he meant when he expressed confusion during the interrogation as to why he (appellant) didn't just keep walking when he saw Timothy Wilson. Lieutenant Jones explained, "Well, I had trouble rationalizing why [appellant] would see somebody that allegedly wants him dead, and even approached him in the first place, but to re-approach them a second time after you seen them make a move or you felt like they might have been arming themselves, I didn't understand why he wouldn't keep going or go the other way." The court overruled a defense objection to this testimony as improper opinion evidence as to whether appellant was telling the truth.

Contrary to appellant's argument, Lieutenant Jones did not offer an opinion regarding appellant's mental state at the time of the shooting. He was merely explaining why he asked a follow-up question in the interview. Additionally, any error in allowing Lieutenant Jones to explain his reasoning process was patently harmless to the extent it made the point that appellant's claim of self-defense was unbelievable because an individual who was truly afraid would have avoided the victim. The jurors were given CALJIC No. 2.82, which instructed them that they were not bound by expert opinions and could disregard them if they found them unreasonable. We can thus assume they would have disregarded Lieutenant Jones's opinion that appellant's self-defense claim was suspicious on its face if they did not agree with it.

Appellant also complains the trial court allowed Lieutenant Jones to rely upon tape recorded telephone calls between appellant's friend Rolls Royce Mitchell and Dameon Hayes to support his opinion that there was a gang-related motive for the Wilson killing. We are not persuaded. The evidence was not hearsay offered for its truth, but to show why Lieutenant Jones reached his conclusion regarding the motive for the Wilson shooting. (*People v. Cleveland* (2004) 32 Cal.4th 704, 728; see Evid. Code, § 1200.) Lieutenant Jones established a connection between Mitchell and appellant, and could properly opine as a gang expert on the issue of motive.

2. Improper Lay Opinion

Appellant argues Lieutenant Jones's testimony as to the gang motivation of the killing should have been excluded because he testified as a lay witness rather than an expert witness on gangs. He argues that this was prejudicial because Lieutenant Jones was permitted to offer opinions that were improper coming from a lay witness and he was likely accorded "unmerited credibility" by the jury because he testified as an "expert." We disagree.

Testimony of a lay witness is limited to matters of which he or she has personal knowledge. (Evid. Code, § 702, subd. (a).) A qualified expert may offer opinions on issues beyond common understanding, and the use of expert testimony in the area of gangs is well established. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1120 (*Hill*).)

Appellant argues that some of Lieutenant Jones's testimony was not expert testimony because it was based in part on his experiences growing up in Oakland rather than his formal training as a police officer. Appellant did not object to Lieutenant Jones's expert qualifications at trial and has forfeited this claim. (*People v. Panah* (2005) 35 Cal.4th 395, 478.) In any event, the claims lack merit. Lieutenant Jones may have grown up in Oakland and may have been personally familiar with some gang members, but this did not preclude him from being qualified as a gang expert who could testify to matters beyond the common understanding of the jurors.

It does not matter that some of the information relied upon by Lieutenant Jones was susceptible to being acquired through personal experience, and was thus a matter partially within the jurors' understanding as laypeople. " '[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness" [citation].' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299–1300.) "Once an expert witness establishes knowledge of a subject sufficient to permit his or her opinion to be considered by a jury, the question of the degree of the witness's knowledge goes to the weight of the evidence and not its admissibility." (*People v. Jones* (2012) 54 Cal.4th 1, 59.)

Focusing on the wiretapped calls heard by the jury and relied upon by Lieutenant Jones, appellant acknowledges that much of the evidence was admissible as admissions. (See Evid. Code, § 1220.) He argues, however, that portions of the calls pertaining to "myriad uncharged robberies, drug crimes and murders" should had been excluded from a lay witness's testimony. We disagree. Lieutenant Jones was not a lay witness, and he was entitled to base his expert opinion on the calls.

As the trial court observed, most of Lieutenant Jones's testimony was based on his personal knowledge and was not hearsay. Experts may rely upon and convey information within their own knowledge. (*Sanchez, supra,* 63 Cal.4th at pp. 675, 685; *People v. Veamatahau* (2018) 24 Cal.App.5th 68, 74.) To the extent Lieutenant Jones's testimony was based on hearsay, experts are permitted to rely on hearsay as background information so long as they do not relate the details of that hearsay to the jury. (*Sanchez, supra,* 63 Cal.4th 685.)

Appellant suggests that having been improperly allowed to testify as an expert, some of Lieutenant Jones's testimony related case-specific hearsay in violation of *Sanchez*, *supra*, 63 Cal.4th 665. He does not identify any of this alleged hearsay, though he appears to focus on statements concerning "uncharged crimes" made by appellant, Mitchell and other Sem City gang members in the wiretapped telephone calls. Broadly speaking, Lieutenant Jones did not rely on the statements in these calls for the truth of their contents, but for the nonhearsay purpose of supplying circumstantial evidence that a feud was ongoing in the Sem City gang. Appellant has identified no case-specific hearsay that violates *Sanchez*, and has not carried his burden of establishing either an abuse of discretion in admitting any evidence or prejudice. (See *Hill*, *supra*, 191 Cal.App.4th at p. 1122.)

D. *Firearm Enhancements*

The trial court imposed a 25-year-to-life firearm enhancement under section 12022.53, subdivision (d) on the murder count and a ten-year enhancement under section 12022.53, subdivision (b) for the robbery count. At the time of sentencing in this case, in March 2017, trial courts did not have the discretion to strike enhancements under section 12022.53. (Former § 12022.53, subd. (h).) On October 11, 2017, Governor Brown signed Senate Bill 620 (2017-2018 Reg. Sess.), which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. (Stats 2017, ch. 682.) Senate Bill 620 added the following language to both statutes: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats 2017, ch. 682, §§ 1–2.)

Appellants contend, and the Attorney General agrees, that the amendments to sections 12022.5 and 12022.53 apply to their cases, which are not yet final. (See, e.g., *People v. Mathews* (2018) 21 Cal.App.5th 130, 132–133.) We remand the case so the trial court can consider exercising its discretion to strike the firearm enhancements. (*In re Estrada* (1965) 63 Cal.2d 740, 744–745 (*Estrada*); *People v. Francis* (1969) 71 Cal.2d

66, 75–79.) We express no opinion as to how the court should exercise that discretion on remand.

D. *Prior Serious Felony Conviction Enhancement*

Appellant's sentence includes a five-year enhancement under section 667, subdivision (a). At the time of sentencing, the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).) On September 30, 2018, the Governor signed Senate Bill 1393 (effective January 1, 2019) which amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)

In a supplemental brief, appellant contends these amendments apply retroactively under *Estrada* and he is entitled to resentencing so the court can exercise its discretion to strike the prior conviction. The Attorney General again agrees. We direct the trial court to consider appellant's five-year serious felony prior comviction enhancement under section 667, subdivision (a) when it resentences appellant. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–975.) Again, we express no opinion as to how this newfound discretion should be exercised and will leave it to the trial court to make that determination in the first instance. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425–428.)

E. *Great Bodily Injury Enhancement*

The jury found true an allegation that in the commission of the murder, appellant "personally inflicted great bodily injury on another person within the meaning of Penal Code section 12022.7(a)." Section 12022.7, subdivision (a) ordinarily provides for a three-year enhancement if such an allegation is found true. Although the trial court orally pronounced a sentence that did not include this three-year enhancement, the minutes and abstract of judgment reflect that a three-year enhancement under section 12022.7, subdivision (a) was imposed. As the Attorney General agrees, great bodily injury enhancements do not apply to a conviction of murder or manslaughter. (*People v. Cook* (2015) 60 Cal.4th 922, 924.) On remand for resentencing, the court shall strike the great

bodily injury enhancement under section 12022.7, subdivision (a), and the striking of the enhancement shall be reflected in the minutes and abstract of judgment.

III. DISPOSITION

The case is remanded for resentencing consistent with the views expressed in this opinion. The judgment is otherwise affirmed.[3]

[3] By separate order filed this same date, we have denied appellant's companion petition for habeas corpus. (*In re Gipson*, on habeas corpus, summarily denied March 14, 2019) A1155638.)

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BURNS, J.

(A150900)